

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

77-4180

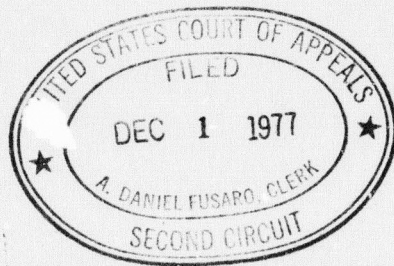
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MADHUKANT JINABAI MEHTA,	:	
Petitioner,	:	PETITION FOR REVIEW
V	:	
	:	
IMMIGRATION AND NATURALIZATION	:	No. 77-4180
SERVICE,	:	
Respondent.	:	

BRIEF FOR PETITIONER



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STATUTES AND REGULATIONS INVOLVED

8 U.S.C. 1255 (1970) (Section 245 of the Immigration and Nationality Act provides in part:

"The status of an alien * * * may be adjusted by the Attorney General, in his discretion * * * to that of an alien is eligible to receive an immigration visa, and is admissible to the United States for permanent residence * * *."

8 U.S.C. 1182(a)(14) (1970) (Section 212(a)(14) of the Immigration and Nationality Act) provides for the exclusion of:

"Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified and available at the time and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed * * *."

5 U.S.C. 552(a)(1)(D) provides:

"(a) Each agency shall make available to the public information as follows: (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public- * * * (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;"

8 C.F.R. 242.17 (1976) provides in part:

"The respondent may apply to the special inquiry officer for * * * adjustment of status under 245 of the Act * * *."

8 C.F.R. 212.8(b)(4) (1967) provides that the following aliens need not obtain the labor certificate:

"(4) an alien who will engage in a commercial agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital."

8 C.F.R. 212.8(b)(4) (1973) provides that the following aliens need not obtain the labor certificate:

"(4) an alien who establishes on Form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing capital totaling at least \$10,000 and who establishes that he has had at least one year's experience or training qualifying him to engage in such enterprise * * *."

8 C.F.R. 212.8(b)(4) (Oct. 7, 1976) provides that the following aliens need not obtain the labor certificate:

"(4) an alien who establishes on Form I-526 that he has invested, or is actively in the process of investing, capital totaling at least \$40,000 in an enterprise in the United States of which he will be a principal manager and that the enterprise will employ a person or persons in the United States of which he will be a principal manager and that the enterprise will employ a person or persons in the United States who are United State citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children * * *."

STATEMENT OF ISSUES PRESENTED

- I. DID THE BOARD OF IMMIGRATION APPEALS FAIL TO CONSIDER PETITIONER'S MOTION TO REMAND, ERRONEOUSLY TREATING IT AS A MOTION TO REOPEN?
- II. DID THE BOARD OF IMMIGRATION APPEALS ERRONEOUSLY ESTABLISH NEW REGULATIONS CONTRARY TO EXISTING REGULATIONS?
- III. SHOULD RULE MAKING RATHER THAN AD HOC ADJUDICATION HAVE BEEN REQUIRED BEFORE RULES FOR QUALIFYING AS AN INVESTOR WERE SUBSTANTIALLY ALTERED?
- IV. WAS PETITIONER QUALIFIED AS AN INVESTOR SINCE HE DID NOT DISPLACE AN AMERICAN WORKER AND HE DID EXPAND THE MARKET?

STATEMENT OF JURISDICTION

Jurisdiction and venue are vested in the United States Court of Appeals for the Second Circuit pursuant to Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a). The decision of the Board of Immigration Appeals was rendered August 15, 1977 and the Petition for Review was filed October 13, 1977.

STATEMENT OF STANDARD OF SCOPE OF REVIEW

Findings of fact if supported by reasonable substantial and probative evidence on the record considered as a whole should not be disturbed by the reviewing court.

This court has unrestricted authority to review issues of law.

STATEMENT OF THE CASE

Petitioner, Madhukant J. Mehta, A19 537 586, entered the United States on October 14, 1971, as a visitor for pleasure. He was charged as an overstay in an order to show cause why he should not be deported issued July 2, 1973. Deportation proceedings took place at various hearings between May 3, 1974 and November 10, 1976. During the course of deportation proceedings, Mr. Mehta had applied for permanent residence, first on the basis of a labor certification, later withdrawn, and subsequently on the basis of an investment in a commercial enterprise, a retail store, primarily involved with the sale of specialty foods. The trade name is Geeta International. The Immigration Judge, in a decision rendered December 14, 1976 denied the application for permanent residence

finding petitioner ineligible as a matter of law and further finding the application should be denied as a matter of discretion. An alternate application for voluntary departure, I & N Act §244(e), 8 U.S.C. §1254(e), was also denied by the Immigration Judge.

An appeal was filed with the Board of Immigration Appeals. In a decision rendered August 15, 1977, the Board of Immigration Appeals affirmed so much of the decision of the Immigration Judge as denied the application for adjustment of status to permanent residence finding petitioner ineligible for investor classification under 8 C.F.R. §212.8(b)(4).

The Board of Immigration Appeals reversed the denial of voluntary departure sustaining the appeal on that issue and granting petitioner the privilege of voluntary departure.

Simultaneously with the appeal to the Board of Immigration Appeals, petitioner filed a Motion to Remand the matter to the Immigration Judge for further proceedings in connection with his application for permanent residence. That Motion was erroneously treated by the Board of Immigration Appeals as a motion to reopen on the basis of current eligibility for investor status under then amended regulations and was denied for failure to document petitioner's eligibility.

Petition for review was timely filed.

ARGUMENT

I. THE BOARD OF IMMIGRATION APPEALS FAILED TO CONSIDER PETITIONER'S MOTION TO REMAND, ERRONEOUSLY TREATING THE MOTION AS A MOTION TO REOPEN

During the proceedings before the Board of Immigration Appeals, petitioner filed a motion to remand containing supplementary documentation which attempted to refute certain aspects of the Immigration Judge's decision. The motion (A.R.31-42) contained two exhibits relating to petitioner's business, GEETA International. The exhibits, a balance sheet dated December 31, 1976, and income statement covering 1976 and balance and income statements for the first quarter of 1977 were submitted to refute the inference made by the Immigration Judge that petitioner's business would not be viable commercial enterprise (A.R.53-54). The financial statement and income statement were not submitted to prove respondent was, at the time of submission, May 31, 1977, then eligible for classification as an investor under regulations amended in October 1976 requiring a minimum investment of \$40,000. 8 C.F.R. §212.8(b)(4) (October 7, 1976). (Please see discussion below). The documents were submitted to demonstrate the actual and increasing viability of the enterprise. They were relevant to the point for which they were submitted.

The paragraph of the Board's decision purporting to address the motion to remand (A.R.18) labels it a "motion to reopen" and denies it for failure to prove petitioner is eligible under new regulations, then in effect, requiring a minimum \$40,000. investment. The Board further states that documents referring to operations occurring after October 7, 1976, the date of the "\$40,000 regulation"

can only be used to support "a motion to reopen so as to consider an application for investor status under the \$40,000. regulation."

This last statement is inappropriate in the context of this case for two reasons. First, it is absolutely irrelevant. This irrelevancy indicates the Board of Immigration Appeals did not make a reasoned decision. In fact, it establishes their failure to read the administrative record which included the motion, denying petitioner administrative due process. Second, the statement is inaccurate as a principle of administrative adjudication. In large part, the period covered by the financial statement is prior to October 7, 1976, the date of the \$40,000. regulation. More importantly, they cover a period prior to the termination of the deportation hearing on November 10, 1976. Following the Board's reasoning to its necessary conclusion, they would have prohibited the introduction of ten month financial and income statements through October 1976 at the November 10, 1976 session of the deportation hearing.

The financial statement should have been considered in the context submitted and failure to do so at the very least resulted in a decision based on improper findings which cannot stand. SEC v. Chenery Corp., 318 U.S. 80 (1943). Post hoc rationalizations cannot repair the inadequacy. Office of Communication, Etc. v. F.C.C., 560 F.2d 529, 532-33 (2d Cir. 1977) and cases cited therein; N.L.R.B. v. Columbia University, 541 F.2d 922 (2d Cir. 1976).

II. THE BOARD OF IMMIGRATION APPEALS ESTABLISHED NEW REGULATIONS CONTRARY TO THE EXISTING REGULATIONS FOR 8 U.S.C.1182(a)(14) WITHOUT SUFFICIENT NOTICE THEREBY UPSETTING THE EXISTENT CONTEMPORANEOUS ADMINISTRATIVE PRACTICE REGARDING IMMIGRANT INVESTOR APPLICATIONS.

The Board of Immigration Appeals decision concedes that Mr. Mehta has invested in a retail establishment which is characterized as one-man enterprise. They further assumed for the purposes of the appeal that he had demonstrated the requisite amount had been invested and that he had the qualifying training experience. Those matters are not in the issue. The sole remaining questions, aside from the adequacy of the Board's decision (discussed supra) concern the standard used to determine petitioner's eligibility for exemption from the labor certification requirement imposed by I & N Act §212(a)(14), 8 U.S.C. §1182(a)(14).

In 1967 the Board of Immigration Appeals decided Matters of Finau, 12 I & N Dec.86(BIA 1967). That case together with the regulation it interpreted set the standard for determination administratively and legally as to qualification for permanent residence as an investor. The regulation in effect when Finau was decided read in pertinent part:

"The following members are not considered to be within the purview of section 212(a)(14) of the Act and do not require a labor certification: *** (4) an alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital; ***" 8 C.F.R. 212.8 (b) (1967).

In affirming the special inquiry officer's finding that Finau did, in fact, meet the qualifications necessary according to the applicable regulations, the Board said:

"8 C.F.R.212.8(b)(4) does not define the terms 'commerical or agricultural enterprise' and 'substantial amount of capital'

**The test of the alien's ability and resources to carry on the contemplated enterprise cannot be measured by hard and fast rules or by the amount of capital that he invests in the undertaking. It will vary with the nature of the enterprise." 12 I & N Dec.86,89.(1967).

This test enunciated in Matter of Finau, established the standard by which both private practitioners and administrative officials operated in dealing with investor applicants until February 1973 when the regulations were amended to read:

"The following persons are not considered to be within the purview of section 212(a)(14) of the Act and do not require a labor certification:*** (4) An alien who established on Form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing capital totaling at least \$10,000 and who establishes that he has had at least one year's experience or training qualifying him to engage in such enterprise***" 8 C.F.R.212.8(b)(4) (as amended February 12, 1973), 38 Fed. Reg.1380, January 12, 1973).

The changes made by the 1973 A.P.A. rulemaking published in the Federal Register were simple. Where previously "substantial capital" was required, that requirement was redefined to require "at least \$10,000." In addition, the investor applicant was, as of February 12, 1973, required to demonstrate at least one year's "qualifying" experience.

Matter of Ko, 14 I & N Dec.349 (May 9, 1973) was decided by the Deputy Associate Commissioner and dealt, at length, with the requirements for qualification for exemption from the labor certification requirement as an investor. Although two U.S. workers (one full-time

and one part-time) were employed in the enterprise in which Ko had invested that fact was not determinative in the decision but was merely stated as a factor to show his efforts did not "replace a U.S.worker" Ko, supra at 351. The decision states:

"The regulation contemplates that the investor's "engaging" in the enterprise will be to an extent which demonstrates an assumption of risk and responsibility for its direction and control. If he is engaged full time to the extent indicated above - and I find that the applicant here is- it is immaterial what his nominal job in the enterprise may be," Ko, supra at 352.

As published decisions, Finau, supra and Ko, supra, have precedential value. "The decisions have been selected and designated as precedents in accordance with Title 8, Code of Federal Regulations, §§3.1(g) and 103.3(e)." P.v.Foreward to Volume 14, Administrative Decisions Under Immigration and Nationality Laws.

Finau, 12 I & N 86(1967) and by necessary implication Ko, 14 I & N 349(1973) were explicitly overruled by a decision of the Board of Immigration Appeals in 1974. Matter of Heitland, 14 I & N Dec. 563 (BIA)1974).(It is noted at this point that the bound volume in which Heitland appeared and which contained the first known public indexing of the decision was published in 1976). In Heitland v. INS, 551 F.2d495(2d Cir.1977) cert.denied____U.S.____(1977) this Court affirmed the Board's holding stating: "Absent some expansion of the market or increase in job opportunities, the existing work force would be adversely affected by the alien's entry." Heitland, supra at 500.

Counsel believes the instant case is factually and legally distinguishable from Heitland, supra and discusses this at length at point IV below. However, it is necessary to discuss the legal efficacy of Heitland and a more recent Board of Immigration Appeals

decision, in the context of administrative adjudication and rule making. It is submitted that the Board of Immigration Appeals pronouncements in Heitland concerning qualification as an immigrant investor violate the Administrative Procedure Act and that the Second Circuit should, therefore, reconsider its affirmance of the Heitland standard particularly as currently interpreted by the Board of Immigration Appeals, e.g. Matter of Ruangswang, Int.Dec.2546 (BIA, Dec 1976). In its Heitland decision, the Board not only overruled Matter of Finau, which was the contemporaneous administrative practice, without any notice, but it also, in effect, issued a new interpretation of the old regulations. It did this by instituting a new test which has no basis in either the old regulation or the 1973 regulation. The Board stated in Heitland:

"It is therefore necessary for us to adopt a test concerning substantial investments which comports with the congressional policy contained in section 212(a)(14) *** the investment either must tend to expand job opportunities and thus offset any adverse impact which the alien's employment may have on the market for jobs, or must be of an amount adequate to insure, with sufficient certainty, that the alien's primary function with respect to the investment and with respect to the economy will not be as a skilled or unskilled laborer." 14 I & N Dec.563 at 567.

The Board's enunciation of this test completely changed the longstanding test described in Matter of Finau above. According to the Administrative Procedure Act, this was a violation of 5 U.S.C. §552(a)(1)(D) which states in relevant part:

"(a) Each agency shall make available to the public information as follows: (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public *** (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; *** (Emphasis supplied)

The test pronounced in Matter of Heitland was a new interpretation of existing regulations. However, it was made not only with no publication as required by the statute but also with no notice as required by the doctrine of contemporaneous administrative practice and longstanding rules.

This doctrine was alluded to as far back as 1827 in the case of Edwards Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210, 6 L.Ed. 603. In that case, it was stated:

"In the construction of a[n] ***ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

The contemporaneous and longstanding administrative interpretation of a statute or regulation should be given great weight. Zemel v. Rusk, 381 U.S. 1 (1965); Udall v. Tallman, 380 U.S. 1 (1965); United States v. American Trucking Association, 310 U.S. 534 (1940). From the inception of 8 U.S.C. 1182(a)(14) in 1953 until 1974 when Matter of Finau was overruled by Matter of Heitland, the contemporaneous and longstanding administrative construction was to recognize as exempt from the labor requirements investments of \$10,000 in owner operated enterprises without any necessity that job opportunities be expanded. Even prior to the 1973 Amendment, \$10,000 was recognized as being a substantial investment.

More recently, there is a long line of cases that require that an agency, changing its longstanding interpretations of rules, must present a clear and well-reasoned analysis explaining the need for change:

"An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis

indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." Greater Boston Television Corporation v. F.C.C., 444 F.2d 841 (D.C.Cir.1970).

Other cases have adopted this point and in fact cite the same sentence which is above quoted. See State of Maine v. C.A.B., 520 F.2d 1240 (1st Cir.1975); Colonial Gas v. F.P.C., 520 F.2d 1176 (D.C.Cir.1975). Matter of Heitland, supra, contains no clear and well reasoned analysis for the change in interpretation.

The cases involving investor applications which follow Matter of Heitland must use the new regulation which requires \$10,000. to have been invested plus at least one year's training or experience. However, the Board continues to use the new test which was required in Matter of Heitland. There is absolutely no basis for that test in either the 1967 or 1973 regulation.

In fact, when the administrators, the Immigration and Naturalization Service, meant to require an investor expand job opportunities by requiring a U.S. employee and by requiring a larger minimum capital investment, they did so in the proper manner by rule making. Proposed rule making appeared on March 10, 1976 (41 Fed. Reg. 10231). After extensive opportunity for comment, final rules, somewhat changed in substance were promulgated (41 Fed. Reg. 37565, Sept. 7, 1976) with an effective date of October 7, 1976. The promulgation specifically was to apply prospectively only and stated that applications for investor status (Form I-526) "properly filed filed before the effective date [October 7, 1977] shall be processed in accordance with this regulation as it existed prior to the

effective date of this amendment" 41 Fed.Reg.37566, Sept.7,1976. The prior regulation, (1973), applicable to petitioner, made no statement requiring U.S.employees.

In this case, the Board did not cite Heitland for the proposition that Mr. Mehata was not eligible for investor status but instead cited Matter of Ruangswang, Int.Dec.2546 (BIA,Dec.27, 1976) which affirmed the Board's holding in Heitland, supra.

It is significant in this context that Ruangswang, supra relied on by the Board in this case was decided well after the close of Mr.Mehta's deportation hearing and after the Immigration Judge's decision below.

The fundamental denial of administrative due process because of lack of notice to petitioner as to the standard's required of him to qualify as an investor is further underlined by the instructions on the Form I-526. Request for Determination That Prospective Immigrant Is An Investor, which petitioner was required to file to obtain exemption from the labor certification requirement (AR 241-242). The instructions essentially repeat the regulations and advise what proofs are necessary and which documents must be submitted to support these proofs. If one followed those rather explicit instructions, one would not have necessarily supplied the information required to comply with Heitland, supra and Ruangswang, supra, as interpreted by the Board in the instant case. **The instructions on Immigration forms have the effect of regulations. 8 C.F.R. §103.2(a) .**

The continuous use of this test by the Board in deciding cases regarding investor status is merely an application of an independent interpretation of a regulation by an arm of an agency which does not have the authority to change the general interpret-

ations or policies of that agency without publication. [5 U.S.C. 552(a)(1)(D)].

An even more recent decision points to that conclusion. In United States ex rel Parco v. Morris, 426 F.Supp.976(E.D.Pa.1977) which distinguished Noel v. Chapman, 508 F.2d 1033 (2d Cir.1974), cert.denied 423 U.S.824(1975), the Court decided that the July 1972 rescission of Operating Instruction 242.10(a)(6)(i) which granted routine voluntary departure to aliens with approved third preference petitions was invalid because of failure to publish pursuant to 5 U.S.C. §552(a)(1)(D)(1970). See also: Lewis-Moto et al v. Secretary of Labor, 469 F.2d 478(2d Cir.,1972); Chou v. Attorney General, 362 F. Supp.1288(D.D.C.1973).

Without the improper interpretation of the investor regulations by the Board of Immigration Appeals in Heitland, supra and Ruangswang, supra, the petitioner would clearly qualify for investor status.

In conclusion, since the Board went beyond its authority and violated 5 U.S.C.552(a)(1)(D)(1970) of the Administrative Procedure Act and the well-known doctrine of construing ambiguous laws according to the contemporaneous administrative practice, the test enunciated in Matter of Heitland and applied to this case by the Board should be declared invalid. The petitioner would then clearly prevail on their petition for adjustment of status to that of investors because they have complied with the applicable regulation.

III. RULE MAKING RATHER THAN AD HOC ADJUDICATION SHOULD HAVE BEEN REQUIRED BEFORE RULES FOR QUALIFYING AS AN INVESTOR WERE, SUBSTANTIALLY ALTERED

The Board of Immigration Appeals is a non-statutory body created by regulation of the Attorney General in the exercise of his responsibilities under the Immigration and Nationality Act. I & N Act §103(a), 8 U.S.C. §1103(a); 8 C.F.R. Part 3. The Board has only those power delegated to it by the Attorney General 8 C.F.R. §3.1(a)(1). Those powers do not include the promulgation of regulations. The power to issue regulations has been delegated by the Attorney General to the Commissioner of the Immigration and Naturalization Service 8 C.F.R. §2.1. The Board has been charged with exercising "such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case[s]" properly before it. 8 C.F.R. §3.1(d)(1).

Conceding arguendo, (please see discussion below) that the Board may have had the power to make new law prospectively by ad hoc adjudication and "that 'every case of first impression has a retroactive effect'... and that generally speaking, 'the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency', SEC v. Chenery Corp., 332 U.S. at 203," N.L.R.B. v. ^{Weaving} Majestic Co., 355 F.2d 854 (2d Cir. 1966), the Court has recognized, citing Chenery, supra, that "the ill effect of the retroactive application of a new standard' so far outweighs any demonstrated need for immediate application to past conduct [citation omitted] as to render the action 'arbitrary'." Majestic Weaving,

supra at 861. Judge Friendly writing for the court in Majestic further recognized that "...the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression. Where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry it regulates." Majestic Weaving, supra at 860. See also N.L.R.B. v. A.P.W. Products Co., 316 F.2d 899 (2nd Cir.1963). See also N.L.R.B. v. Bell Aerospace Co., 416 U.S.267 at 294-295 (1974).

Where, as here, the longstanding practice in regulating the conduct involved has consistently been the subject of A.P.A. rulemaking and the tightening of standards of eligibility evidenced by the decisions in Heitland, supra and Ruangswang, supra. had already been the subject of proposed and final rulemaking (March 10, 1976 and October 7, 1976) with even more restrictive standards of eligibility, there appears no need to give efficacy to the ad hoc adjudication to Ruangswang which retroactively affected petitioner.

The Immigration Judge referred to the new, i.e. \$40,000 minimum and U.S. employee regulation in his decision (A.R.54-55) referring to the statements accompanying its promulgation while denying he was giving then retroactive effect. Counsel will not concede this alleged lack of retroactive application; particularly since the policy statement relied upon by the Immigration Judge does not appear to be accurate in terms of long standing administrative practice and the history of the regulation involved as discussed above.

It is submitted that consideration must be given to the ability

of the Board of Immigration Appeals to change the law in an area that has already been the subject of explicit regulation, including detailed instructions as to eligibility on the form required for application. The Board has no power to issue regulations or to change regulations validly promulgated.

IV. PETITIONER QUALIFIED AS AN INVESTOR SINCE HE DID NOT DISPLACE AN AMERICAN WORKER AND HE DID EXPAND THE MARKET

The standard enunciated by this Court for qualifications as an investor pursuant to 8 C.F.R. §212.8(b)(4) states:

"Absent some expansion of the market or increase in job opportunities, the existing work force would be adversely affected by the alien's entry. Heitland, v. INS, supra at 500.

The Heitland case before the Board of Immigration Appeals had produced the following statement of the new standard:

"Consequently, the investment either must tend to expand job opportunities and thus offset any adverse impact which the alien's employment may have on the market for jobs, or must be of an amount adequate to insure, with sufficient certainty, that the alien's primary function with respect to the investment, and with respect to the economy, will not be as a skilled or unskilled laborer." Matter of Heitland, 14 I & N Dec. 563(1974).

Matter of Ruangswang, Int. Dec. 2546 (BIA Dec. 27, 1976), the case relied upon below by the Board in determining Petitioner did not qualify as an investor adopted the Board's standard enunciated in Heitland.

Assuming, arguendo, that this Court holds that Petitioner is bound by the standard as enunciated in Ruangswang, supra and in Matter of Heitland, supra and/or Heitland v. INS, supra, petitioner's investment is factually distinguishable from the investment made

in Heitland. It is submitted that the Board of Immigration Appeals misapplied their own legal standard in determining the investment in Ruangswang was not the type necessary to provide exemption from the labor certification requirement of I & N Act §212(a)(14), USC 1182(a)(14).

In Heitland, aside from the fact that the business was non-existent at the time the case was decided by the Board (see Heitland v. INS, supra at 500), the total investment had been, at most, \$3,400 and produced a gross income of only \$14,000 for the year for which the figures are given. In addition, the facts seem to support the conclusion that Heitland was entering a finite market in direct competition with other delivery men. He provided no possible market expansion but could only generate income apparently, by taking the income from other drivers since they were competing to deliver the same packages. If Heitland didn't deliver a package one of the existing drivers would have done so.

Mr. Mehta invested over \$10,000 in a commercial retail outlet. His sales in 1975 were in excess of \$46,000 (A.R.274) and in 1976 were almost \$51,000 (A.R.36).

His purchases for inventory exceeded \$30,000 in both 1975 and 1976 (A.R.36 and 274). His net income increased almost fifty per cent from 1975 to 1976 and for 1976 he had a net profit over \$8,000 on a gross profit of over \$15,000 (A.R.36 and 274).

More importantly, perhaps, is the fact that he was not taking an existing job thereby adversely affecting the U.S.labor market. But for his investment, there would have been no GEETA International for him to manage and operate. There is absolutely no evidence in this

record that he was in direct competition with anyone. He was expanding the market and despite the Board's cursory dismissal of the claim that petitioner's business through purchase of almost \$70,000. in inventory over a two year period tended to expand job opportunities (A.R.17), it is submitted that these purchases from wholesalers did tend to expand the job market. Small retail businesses have always been an integral and vital part of the American economy providing service to the customer and a market for goods which then must be manufactured or processed, packaged and shipped. The Board of Immigration Appeals addressed this very issue shortly before it decided Heitland. Matter of Ko, 14 I & N Dec.349 (Dep.Assoc.Comm.,May 9,1973) dealt with a very similar situation in which the manager of a shoe retail business also operated the cash register in the store. In that case Deputy Associate Commissioner stated:

"***it is not unreasonable to conclude that it was not the purpose of Congress in this section to discourage an alien's bona fide effort to establish and conduct his own business here, where his stake in that business is to be substantial and irrevocably committed, and where there are encouraging prospects for its success. It cannot be said in any real sense that the applicant's employment in a job that did not exist before he made his investment is unfairly competitive with American labor. His employment in his own business is not the 'job competition' which the Congress wished to protect against. His conduct of his business does not 'replace a worker in the United States' or 'adversely affect the wages and working conditions' of individuals in the United States similarly employed." 14 I & N Dec.349 at 351.

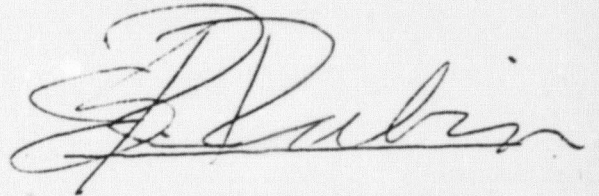
On the facts of the instant case, the above quote very adequately summarizes petitioner's argument on this point.

Mr. Mehta has committed himself to his investment in GEETA International. He falls clearly within the standard enunciated in

in Ko, supra, and is, therefore, not displacing American workers nor is he engendering the type of job competitioner which Congress intended to protect against. His application for permanent residence should be granted.

WHEREFORE, for the reasons contained in the foregoing analysis, petitioner respectfully prays this Court to reject the decision of the Board of Immigration Appeals denying him adjustment of status.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'E. Rubin', with a stylized, cursive script.

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November 30, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MADHUKANT JINABAI MEHTA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent

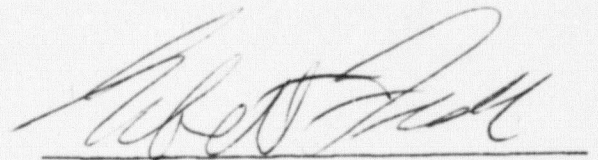
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PETITION FOR REVIEW

NO. 77-4180

CERTIFICATE OF SERVICE

I, **ROBERT FRANK** hereby certify that a copy of the Brief
and Joint Appendix in this matter was served upon Richard Leon, Esq.,
by hand on **15th** day of **December**, 1977.



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November 30, 1977

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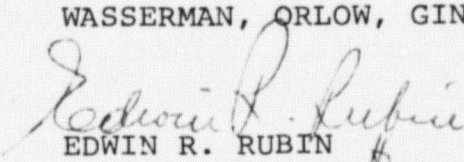
RE: Mehta v. INS, No. 77-4180

Dear Sir:

Enclosed herewith please find the original and ten copies of
Petitioner's Brief in the above captioned matter. Service upon
the United States Attorney has either been made or will be made
by hand tomorrow.

Very truly yours,

WASSERMAN, ORLOW, GINSBERG & RUBIN


EDWIN R. RUBIN

ERR:seg
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